

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)
)
Rate Regulation)

MM Docket No. 92-266

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its comments on the application of the new cable rate rules to small cable systems. NCTA is the principal trade association of the cable television industry, representing cable television system owners and operators and cable programmers. NCTA's members also include equipment suppliers and others interested in or affiliated with the cable industry.

INTRODUCTION

In its initial Report and Order on cable rate regulation, the Commission relaxed some of its rules with respect to small cable systems as directed in section 623(i) of the 1992 Cable Act. The Commission appropriately concluded that in reducing the administrative burdens and costs of compliance with the new rules "no distinction should be made between small systems that are

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independent and those controlled by MSOs".^{1/} As the Commission recognized, the language in section 623 does not distinguish between independently-owned small systems and those owned by MSOs. Moreover, the Commission found that small cable systems serving smaller, more rural communities, face the same problems regardless of whether they are owned by a larger MSO.

In the Further Notice of Proposed Rulemaking ("Further Notice"), however, the Commission inexplicably questions its initial decision to treat all small systems equally. It seeks comment on whether any relief accorded to small systems should extend to systems affiliated with an MSO. NCTA submits that, as a matter of law and policy, the Commission's first decision was right -- small cable systems, whether MSO-affiliated or independently-owned, are entitled to the same regulatory relief under the Act.

DISCUSSION

I. THE COMMISSION LACKS THE LEGAL AUTHORITY TO DIFFERENTIATE BETWEEN SMALL CABLE SYSTEMS ON THE BASIS OF WHETHER OR NOT THEY ARE AFFILIATED WITH AN MSO

Under section 623(i) of the Act, the Commission is required to develop and prescribe cable rate "regulations that reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers." On its face, this statutory directive plainly does not differentiate between any

^{1/} Report and Order in MM Docket No. 92-266 at para. 464.

small system based on ownership or any other attribute. And there is nothing else in the Act or its legislative history to suggest that MSO-affiliated small systems should be outside the scope of the small system provision. Indeed, the legislative history shows that Congress considered such an exception and rejected it.

In House floor debates on the "small system amendment" offered by Congressman Slattery, the precise issue of the amendment's application to systems affiliated with an MSO was raised by Congressman Cooper:

I think all of us are in favor of small businesses and small business exemptions where necessary to allow small businesses to cope with the terrific paperwork burden that they face; but this amendment is not drafted just to help the independent small businessman who has trouble with paperwork. The way this amendment is drafted, subsidiaries of the largest cable companies in America would benefit.^{2/}

He went on to state:

We need to focus this amendment on its intended purpose. I hope in conference we will be able to do so, to help the independent small businessman and only the independent small businessman.

In response, Congressman Slattery noted:

I will say to the gentleman that I hope as we move forward in the process that we may be able to address this; but candidly to this point in the process, I have not been able to figure out

2/ 138 Cong. Rec. H6525, H6526 (July 23, 1992). The Slattery amendment, which was supported by Congressman Dingell and adopted by the House, changed the language in the small system provision of then House bill H.R. 4850 from "500 or fewer subscribers" to "1000 or fewer subscribers."

how to speak to the legitimate concern of a lot of our small cable operators in this country who do not need this additional administrative burden and who are serving their communities quite well.

At the conclusion of this colloquy, House Telecommunications Subcommittee Chairman Edward Markey supported the amendment, noting that he hoped that once the legislation moved to the Conference Committee the members would "try to draft language which deals with many of the issues we are concerned about, while preserving the core of the objectives" raised by the amendment's sponsor. But, in fact, Congress did not modify the language of the amendment with regard to MSOs once the bill went to the Conference Committee.

Thus, the statute says what it says. Unlike other areas of the Act's implementation, where the FCC was instructed to develop regulations based on a consideration of articulated factors, Congress established the small system rule with no language of exception. Those cable systems that serve 1,000 or fewer subscribers are within the statutory definition of small cable systems, regardless of whether they are independently-owned or affiliated with an MSO. There is no legal basis for the Commission to depart from Congressional intent by distinguishing between small systems based on ownership under its implementing rules.

Furthermore, establishing a bright line between one group of MSOs and another for these purposes, without any way of knowing that the line drawn reflects a balancing of burdens and benefits would be arbitrary and capricious. It was for this reason, as

the above cited colloquy indicates, that Congress itself did not draw a line and did not leave that task to the Commission either.

II. THE NEW RATE REGULATIONS PRESENT ADMINISTRATIVE BURDENS AND COSTS FOR ALL SMALL SYSTEMS, REGARDLESS OF WHETHER THEY ARE INDEPENDENTLY-OWNED OR MSO-AFFILIATED

As NCTA and other cable organizations have recommended in this proceeding, the Commission should take action to alleviate unnecessary burdens on small cable operators -- burdens that will drive up costs and rates to subscribers.^{3/} The Commission should not presume, however, that MSO ownership of a small system automatically would ensure less costly compliance with the rate regulation rules and procedures. This is because the cable industry is largely decentralized, and the problems are usually system-specific.

Under the current rate regulations, for example, operators must engage in complex calculations and time-consuming analyses at the local level. The requirement that operators separate out their equipment costs based on actual costs from the benchmark

3/ See NCTA Petition for Reconsideration, MM Docket No. 92-266, filed June 21, 1993. In its Petition, NCTA proposed a revised benchmark process that will streamline the administrative burden for all cable systems, both large and small. However, in cases where a small system has rates above the benchmark, we advocated mechanisms to simplify cost-based proceedings. One method for doing so, as the Commission has suggested, would be to establish a presumption that such system's rates are nonetheless reasonable, and to shift the burden of proof to franchising authorities to demonstrate that the system's rates are unreasonably high.

rates is a particularly onerous procedural requirement that must be performed by individual systems. As we have urged the Commission, a mechanism should be adopted that would relieve small operators of having to unbundle equipment and perform such detailed calculations.^{4/} Nevertheless, there is no reason to believe that the burden of performing these tasks will be any less for small systems owned by an MSO.

Moreover, since small MSO affiliates are geographically disconnected from the larger corporate office, they share most of the same limitations -- and costs -- borne by independently-owned systems. Like small independent systems, small MSO affiliates often serve rural areas with a density of as few as 10 to 20 subscribers per mile. This low density greatly increases the cost to service customers; to install and maintain cable plant and equipment; and to provide adequate personnel and other resources.

Another example of the disproportionate cost of regulation on small systems is the new customer service rules, which require cable operators to maintain local offices in each service area community. Under these rules, a system serving several communities of less than a few hundred subscribers would be obligated to bear the costs of establishing separate offices in

4/ Letter to Chairman James H. Quello from David D. Kinley, Small Cable Business Association, Stephen R. Effros, Community Antenna Television Association, Michael J. Pohl, Coalition of Small System Operators, Decker Anstrom, National Cable Television Association, dated July 13, 1993.

each community with little benefit to consumers. This requirement will be exceptionally burdensome to many small operators serving a small number of subscribers, whether or not they are owned by an MSO.

The point is that although some small systems may have the benefit of certain economies of scale by virtue of their affiliation with an MSO, this does not alleviate the higher built-in costs faced by all operators serving a small subscriber base.

Furthermore, in reducing administrative burdens for all small systems, the Commission should bear in mind that only a small number of subscribers will be effected by such action. According to A.C. Nielsen figures, a total of 2,095,074 subscribers are served by cable headends serving 1000 or fewer subscribers. This constitutes approximately 3 1/2 percent of the over 58 million cable households nationwide.^{5/} Thus, the impact of special small system rules on the overall industry subscriber base will be minimal. But, as we have shown, the costs of imposing undue burdens on these systems will be enormous.

Under section 613(i), the Commission is not deregulating cable systems but making the regulations less burdensome for systems serving a very small number of subscribers. In so doing,

5/ A.C. Nielsen, Cable On-Line Data Exchange (CODE) (as of August 1993). According to A.C. Nielsen's database, a little over half of all cable headends will be effected by reduced administrative burdens for small systems.

the Commission will help ensure that small cable operators are able to serve their subscribers efficiently and effectively, without sacrificing any of the Act's consumer protections. In the end, there is simply no public interest reason to impose unnecessary burdens on any small system -- whether or not some larger corporate entity may be able to bear the associated additional costs.

CONCLUSION

For the foregoing reasons, the Commission should not adopt rate regulations that distinguish between small cable systems based on ownership. The statutory mandate to reduce administrative burdens in Section 613(i) of the Act applies to all cable systems serving 1000 or fewer subscribers.

Respectfully submitted,

NATIONAL CABLE TELEVISION
ASSOCIATION, INC.

By *Daniel L. Brenner* /ep
Daniel L. Brenner
Loretta P. Polk

ITS ATTORNEYS
1724 Massachusetts Ave., NW
Washington, DC 20036
(202) 775-3664

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